CHAPTER 6

COPYRIGHT'S HISTORY AND ITS FUTURE

Copyright protection is one of the most controversial issues of our time. Copyright creates tension between the interests of the public and those of creators and the industries that rely on it. The temporary monopoly given to creators denies the rest of society free access to literary resources, even as technological advances have made widespread dissemination and new ways to use works easier to accomplish every day. In recent years, that tension has escalated as the scope of works covered and the duration of the monopoly have grown dramatically. The music and film industries have grown more aggressive in prosecuting infringement and lobbying Congress for more tools by which to do so, and advocates for more access to knowledge have gotten more potent in mobilizing individuals and vocalizing their opposition to new copyright restrictions.

The Copyright Act in force today seems ill equipped to balance these competing interests effectively. It was passed when copyright owners' highest anxiety concerned photocopying technology—before personal computers became widespread and long before the Internet connected society across borders. Today, new and evolving methods to create, store, copy and deliver information are still governed by a law passed almost forty years ago and last amended significantly in 1998. While virtually any

creative work can be digitally copied and transmitted in unlimited numbers or posted online instantly, these acts are subject to the same rules and penalties designed to remedy blatant plagiarism or the misappropriation of a manuscript by an unscrupulous publisher. As the term and scope of copyright protection have grown in the face of these new technologies, a groundswell of commentators and members of the public have argued, vehemently, that the purpose of copyright requires more, not less, access to creative works. At the same time, the copyright industry, including film, music, software producers and publishers, continues to lobby hard, often successfully, for stronger and longer protection. Would ending copyright as a monopoly and allowing more dissemination of literature, art, and other products of the mind better serve the public interest? Can the interests of the public and of creators be reconciled more effectively than the law currently allows? As owners and users of cultural works, writers have much at stake in the outcome of these issues. To put these questions into perspective, the following brief history of copyright attempts to describe some of the underlying forces that have shaped the law that governs our society today.

THE HISTORICAL UNDERPINNINGS

The ancient civilizations had no concept of copyright; the ownership of words was not distinct from the ownership of the papyrus or parchment containing the words. The Roman poet Martial complained that he received nothing when copies of his work were sold and coined the term *plagiarius* (which is Latin for "kidnapper") to describe a rival who had copied his work without attribution. Still, plagiarism was the norm, and even encouraged, for most of history. People did not consider literature as property, and had no trouble with the concept of borrowing from others. Many of Shakespeare's plays were openly based on previous works. A collective view of the products of creativity existed throughout the Middle Ages, when religious literature predominated; individual creativity was not rewarded and the reproduction of manuscripts rested in the dominion of the Church. It was only with the rise of the great universities in the twelfth and thirteenth centuries that lay writers began producing works on secular subjects. Extensive copying by trained scribes became the norm, but only the publishers could realize a profit by selling manuscripts to the wealthy.

Even before the introduction of movable type to the West in the fifteenth century, English publishers had formed a Brotherhood of Manuscript Producers in 1357 and received a charter from the Lord Mayor of London. Gutenberg's introduction of the printing press to the Western world in 1437 gave individual authors more opportunities for self-expression and the rise of printing techniques in England led to a growing demand for books. In 1483, Richard III lifted legal restrictions against foreigners if they happened to be printers, but within fifty years, the supply of books had so far exceeded demand for them that Henry VIII decreed that no person in England could legally purchase a book bound in a foreign nation. Henry's successor, Queen Mary, gave the Brotherhood of Manuscript Producers, now called the Stationers' Company, a charter—that is, a monopoly—over all book publishing in England. No writer could publish a book unless it was with a member of the Stationers' Company. The restriction served the Queen's purpose of preventing writings seditious to the Crown and heretical to the Church.

Under the Stationers' charter, the right of ownership in a literary work did not reside in the writer's creation, but solely in the printer's right to make copies of that creation. The Stationers' Company maintained its monopoly by clamping down on secret presses with the aid of repressive decrees from the Crown. Out of this monopoly, the recognition arose of a right to make copies of literary works as distinct from the ownership of the physical manuscript. This right was based in common law and had no expiration date as long as the Stationers' charter lasted.

Given its exclusive grip on the right to control the exploitation of printed works—even works of long-dead authors—the Stationers' Company objected vehemently when its charter and powers expired in 1694 and Scottish "pirates" began reprinting their titles and undercutting their prices. They lobbied the Crown for a new law, and eventually the Statute of Anne was enacted in 1710. Happily for individual creators, the law was largely crafted and promoted by writers, including Joseph Addison, Jonathan Swift, and Daniel Defoe. The Statute of Anne recognized authors' as well as publishers' interests and replaced the Stationers' perpetual common law monopoly with a statutory copyright for writers, who were permitted to sell their rights to publishers for a limited time, after which the rights expired. The goal of the Statute of Anne was to encourage "learned men to compose and write useful books." Booksellers and publishers

objected to the term limits in the Statute and argued that their exclusive common law right to publish the books on their lists lasted forever. English jurists eventually ruled that the limited statutory copyright superseded the perpetual common law rights of printers.

Another effect of the Statute of Anne was to eliminate the use of copyright as a means of censorship. Any author could now legally sell his copyright to any publisher willing to invest in printing and distributing his work.

COPYRIGHT COMES TO AMERICA

The copyright law of the United States grew out of the Statute of Anne. Between 1783 and 1789, Noah Webster successfully helped lobby twelve of the original thirteen states to recognize copyright, but complained about having to travel to each state to register, because there was no legislative reciprocity among the Confederation of States. He urged the new Republic in 1789 to pass federal copyright protection. The US Constitution provided that "The Congress shall have the power . . . To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." In crafting the Constitution, Thomas Jefferson and James Madison expressed ambivalence about the concept of a private monopoly over ideas and inventions. Their decision to include copyright rested on the "limited time" and private, as opposed to government, ownership of such monopolies.

In 1790, Congress enacted the first federal copyright statute, providing protection for books, maps, and charts for an initial term of fourteen years plus a renewal term of fourteen years, mirroring the term in the Statute of Anne. The renewal term only arose if the copyright owner took affirmative steps to file a renewal registration. Because most works did not retain economic value after their first term, they were not renewed and therefore entered the public domain. In 1831, Congress increased the initial term of copyright to twenty-eight years, plus a fourteen-year renewal term. In 1865, the law was amended to cover photographs and negatives. In 1870, it added coverage for paintings, drawings, sculptures, and models or designs of works of fine arts. In 1909, Congress completely revised the copyright law and expanded the exclusive rights granted to authors. The initial term of copyright remained twenty-eight years, but the renewal term was increased

to twenty-eight years. For the first time, the right to make derivative works such as translations and abridgements was recognized as an exclusive right of the author.[33]

The 1909 Act as interpreted by the courts favored publishers' interests over those of authors. For example, the various rights to exploit a copyright were deemed indivisible, so an author's grant of publication rights had the effect of transferring the entire copyright to the publisher.[34] The courts also thwarted Congress's intent to allow the original author to enjoy the longer renewal term by enforcing agreements made during the original term to license away the renewal term, if one arose.[35]

The inventions of radio, television, motion pictures, satellites, software, and other innovations eventually required a complete revision of the 1909 Act, and the new Copyright Act of 1976 was passed as of January 1, 1978. Although subsequent amendments, such as the Digital Millennium Copyright Act of 1998, have tried to address the pressures of globalization and the development of new ways to make, copy, and deliver creative works, technology continues to outrun the law. Judicial interpretations of the Act, especially from the Second and Ninth Circuits and the Supreme Court, have had to try to fill the gaps in the law that fail to address the realities of the Information Age, with varying degrees of success.

INTERNATIONAL COPYRIGHT PROTECTION

Historically, copyright protection extended only within the nation of origin, that is, the country of first publication of the work. In the twentieth century, protection began to expand across national borders through treaties and bilateral agreements. Today, most countries, including almost all developed countries, offer some measure of copyright recognition of foreign works.

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[33] In a notable judicial ruling from 1853, a court denied Harriet Beecher Stowe's infringement claim against an unauthorized publisher of a German translation of "Uncle Tom's Cabin," because derivative works were not recognized as part of a copyright.

[34] The 1976 Act specified that the "bundle of rights" bestowed on the author is severable and that the rights may be individually licensed. See chapter 2.

[35] The 1976 Act gave authors an expressly inalienable right to terminate grants of rights after 35 (for post-1977 works) or 56 (for pre-1978 work) years. The termination right is explained in chapter 2.

The US industries dependent on copyright consider international coverage to be acutely important. The export of copyrighted works is big business and remains a growing sector of the economy, one that faces widespread piracy abroad. But the stance of strong international protection was not always the prevailing view of the United States. In fact, from its founding, the United States was considered a "copyright island," even the "Barbary coast" of copyright. This attitude lasted until, after refusing to join for a hundred years, the United States signed the Berne Convention for the Protection of Literary and Artistic Works in 1989.[36] The United States had resisted joining Berne for several reasons: rivalries between American and British publishing houses; Berne's minimum standards requiring (at the time) at least a fifty-year term of protection and banning the formalities of notice, registration, recordation, and deposit; moral rights (the right to freedom from false attribution, improper editing or alterations, and mutilation, which has a long history in Europe and remains largely nonexistent in the United States); and so-called "national treatment" (the rule that member nations must protect foreign works to the same extent they protect domestic works). But the primary reason international copyright protection was not a high priority to US lawmakers was because until the late twentieth century, the United States was a net importer of copyrighted works.

The United States refused to join Berne in part because of its reliance on the cultural wealth of Europe. Through the nineteenth century, there was virtually no international market for American works, and between 1790 and 1891, foreign writers had no copyright protection in the United States. American publishers freely pirated the works of Dickens, Trollope, Hugo and many others. Dickens wrote of the "monstrous injustice" of foreign writers denied any royalties from brisk United States sales of their works. Adding to the injustice, American publishers could secure full international protection through the "back door" by simultaneously publishing a work in a Berne signatory, such as Canada, making the "country of origin" a Berne nation.

UNITED STATES PROTECTION FOR FOREIGN WORKS

As economics change, political accommodation is usually not far behind. As cheap British knockoffs, distributed without advances or royalties, began

[36] Chapter 2 describes the terms of Berne and other copyright treaties.

to undermine publishers and writers trying to market American literature abroad, Congress began to show interest in international copyright protection. After bearing the reputation as a copyright scofflaw for a hundred years, the United States finally passed the Chace Act in 1891, which allowed foreign writers to copyright their published works in the United States (and unpublished works of foreign origin to be protected in perpetuity under common law). But the Chace Act had a catch that essentially made US copyright recognition of foreign works illusory—the notorious "manufacturing clause." The manufacturing clause required that, to be eligible for copyright protection, foreign works must be printed from type set, negatives, or stone drawings made within the borders of the United States.

The 1909 Copyright Act treated foreign writers and publishers only slightly better. A foreign citizen could copyright a book in the United States as long as the writer actually lived in the United States when the book was first published and adhered to the unique American formalities of notice, registration, renewal, and deposit. The 1909 Act left the United States fundamentally at odds with both the specific tenets of the Berne Convention and the more liberal copyright protection offered by most Western European nations. Still unwilling to join Berne by 1952, the United States helped create the Universal Copyright Convention ("UCC"), which is still in force today. In most ways, the UCC merely codified existing American law. The only significant concession to foreign member countries was the abolition of the manufacturing clause with respect to UCC member nations. Under the UCC, works created by American nationals, regardless of where published, enjoy the same protection in any UCC member country that its local works receive. The United States retained its notice, registration, recordation, and deposit requirements, even though the few signatories that had such provisions had already abolished them. Despite its shortfalls, the UCC finally opened copyright relations between the United States and more than eighty countries.

In the mid-1980s, the United States attitude toward international recognition of copyright began to change more dramatically. Government research and the strong lobbies of the entertainment and publishing industries showed that American enterprises were suffering major losses from foreign piracy. As a result, the US finally joined the Berne Convention on March 1, 1989, accepting the (then) term of life-plus-fifty years and, significantly, abolishing most formalities.

Today, more copyrightable works are produced in the United States than in any other country, and they represent a substantial portion of United States exports. The US Chamber of Commerce estimates that approximately 19 million jobs in the United States are in the intellectual property industries. In the developing world, the piracy of US software and entertainment industry products is big business. The affected industries—film, music, software, book and periodical producers—are politically powerful. Because a substantial and growing portion of their profits come from foreign sales (a bright spot in the US economy's otherwise dismal balance of trade), they have vigorously demanded stronger worldwide protection, and the government has largely complied. The old US policy that encouraged American publishers to disseminate foreign works without paying the authors is long dead; combating the worldwide misappropriation of American intellectual property is now an urgent task for the government and the private sector. In addition to joining most of the world in the Universal Copyright and Berne Conventions, the United States has used other arenas to push aggressively for protection of its nationals' intellectual property interests, including trade sanctions, the World Trade Organization, and bilateral agreements.

The United States has promised to use trade sanctions and other economic weapons available under the General Agreement on Tariffs and Trade ("GATT") against nations that fail to protect United States intellectual property rights. Section 301, an amendment to the Trade Act of 1974, authorized the President to impose trade sanctions against any country that fails to protect American copyrights adequately or engages in unreasonable or unjustifiable trade practices. The World Trade Organization ("WTO"), which evolved from the Uruguay Round of GATT negotiations, came into force on January 1, 1995. One of its important elements is the standard that dictates the minimum levels of protection member countries must incorporate into their national intellectual property laws. In December 1994, the United States enacted a law to approve and implement the Uruguay Round agreements, including conforming amendments to United States copyright law.

In exchange for agreement on the minimum protection and enforcement provisions that nations, including Russia and China, were obligated to meet for membership in the WTO, the United States had to agree to restore copyright in foreign works that had fallen into the public domain because the owners had not observed the formalities of notice, registration, deposit or renewal prior to the passage of the 1976 Act. The United States

restored copyright in these works on January 1, 1996. Restoration of formerly public domain works raised an outcry among many in the United States, including businesses that rely on exploiting such works. They sued the government on the theory that taking works out of the public domain violates both the "limited times" requirement of the copyright provision of the Constitution and the First Amendment. Remarkably, the case lasted twelve years, reached the Ninth Circuit twice, and the restoration of copyright to these works was finally upheld as constitutional by the Supreme Court in 2012.

RECENT EXPANSIONS OF COPYRIGHT: THE DMCA

With the rise of the Internet in everyday life, scholars and commentators have argued that the current copyright regime is both unfairly weighted in favor of owners and against the public interest, and ill-equipped to meet current and future technological challenges. Congress passed the Digital Millennium Copyright Act in 1998 in response to the reality that digital technology and the Internet makes it simple and free to obtain, copy, and widely redistribute copyrighted works. Copyright owners face a significant threat of having their works copied and distributed to a large audience instantly and without authorization. At the same time, digital, networked communication is an enormously valuable innovation for sharing information and entertainment to anyone with access to the web. It has tremendously enriched society and has the potential to build and distribute knowledge at ever increasing rates.

Many commentators have made the case that authors and societies benefit more if a large audience can enjoy copyrighted works with no barriers.[37] But for writers who need a publisher to distribute their works and to earn income from their writing, copyright is the only real mechanism by which to do so. The copyright lobby regards technological protections, such as encryption, "watermarking," and digital rights management systems, as necessary to control online distribution. Although these systems are far from foolproof and anyone determined to can defeat most technological

[37] Indeed, creators who choose these terms of dissemination can easily do so. For example, they can use a Creative Commons license to give the public free access to their works under certain simple conditions. See Chapter 5 for more about Creative Commons.

protections, they can significantly reduce infringement among most of the public and give publishers and distributors greater control over how their works are disseminated.

Thus, in addition to its "notice and take down" measures described in chapter 5, the DMCA made it a crime to circumvent encryption, digital rights management techniques, and other technical anticopying measures protecting copyrighted works. Circumvention of a digital "lock" is a crime even if done for noninfringing uses, such as to make fair use or to review a work in order to decide whether to purchase it, or to defeat malfunctioning encryption on a legally purchased copy. Understandably, many people, especially educators and librarians, bitterly protested the anticircumvention provision. They pointed out that it would give copyright owners, whose products are increasingly distributed in encrypted digital formats, a simple way to eliminate fair use with the force of criminal law.[38] Responding to the backlash, Congress devised a compromise. It delayed the effective date of the anticircumvention provisions for two years, during which time the Librarian of Congress was to exempt any classes of users that were, or were likely to be, adversely affected in their ability to make noninfringing uses. In October 2000, the Librarian exempted two categories of works from the prohibition: compilations of lists of websites blocked by filtering software applications, and literary works protected by access control technologies that fail to permit access because of malfunction or damage. Citizens may apply to the Librarian of Congress for an exemption from the circumvention prohibition every three years. The Librarian has since exempted several classes of users that demonstrated a legitimate need to circumvent encryption: anyone needing to access files in obsolete formats; film scholars needing to create clips from DVDs to teach more effectively; and later, documentarians, college teachers, film and media studies students, and noncommercial video creators needing to make fair use purposes.

THE BATTLE OVER TERM EXTENSION

In 1998, Congress added twenty years to the term of copyright protection for all works covered by the 1976 Act when it passed the Sonny

[38] In response to a First Amendment challenge, the Second Circuit ruled in 2001 that the anticircumvention provisions of the DMCA are not unconstitutional restraints on free speech to the extent they criminalize the publication of de-encrypting code.

Bono Copyright Term Extension Act.[39] Part of the rationale for extending the term was that it would equal those of many of the Berne countries, including the entire European Union and the United Kingdom. The EU had instructed members to deny the longer terms of protection to the works of nations that did not observe the same term. Congress wanted to secure the same term of protection for US copyright proprietors that their European counterparts have. Another justification Congress cited was that extending the term accounted for the increased life expectancies of the heirs of an author.

In *Eldred v. Ashcroft*, a group of public domain works publishers immediately challenged the constitutionality of the CTEA, arguing that it violated both the "limited times" requirement of copyright and the First Amendment by locking up for another twenty years millions of works that would have entered the public domain. The case reached the Supreme Court, which ruled in 2003 that although Congress had perhaps acted injudiciously, it had properly exercised its discretion to extend copyright because the term was literally "limited" in time. The Court opined that the Copyright Act complies with the First Amendment by not covering ideas and facts and by allowing fair use. Two separate dissenting opinions indicated that Court would not automatically accept future extensions of the term.

SOPA AND PIPA VERSUS THE INTERNET

In recent years, US intellectual property industries, including copyright owners and the makers of products with distinctive trademarks, have become worried about international websites that openly sell pirated films, software, games, music, books, and "knockoff" trademarked goods such as watches and handbags. Legally speaking, little can be done from here to prosecute or block the many foreign purveyors of pirated US goods. The industry came up short in court when it tried to go after the credit card companies that process sales of pirated goods and the search engines that

[39] Sonny Bono, a composer, producer, and recording artist, famously said the "limited times" of copyright should be "forever minus one day." He was elected to Congress in 1994 and sponsored term extension legislation. After he died in an accident in 1998, Congress thought to honor his memory by naming the CTEA after him.

help buyers find them. In 2012, the copyright lobby came close to convincing Congress to pass even more aggressive means by which to stop infringement on international websites by allowing the industry to target legitimate organizations that, through their normal operations, "facilitate" infringement by other websites.[40]

The Stop Online Piracy Act (SOPA) introduced in the House of Representatives and the Protect IP Act (PIPA) in the Senate would have given the Justice Department and private interests powerful new enforcement tools against international sites by targeting service providers and websites that associate with them. PIPA would have given corporations and the government the right to sue any website or service they alleged were "enabling" others' copyright infringement, whether in the United States or internationally. These "enabling" sites and services could have included search engines, blog sites, servers, DNS providers, directories, advertisers, payment processors or any other site that linked or pointed to an alleged pirate site. The copyright owners would have been empowered to devise a list of websites considered to be infringers, and the rest of the Internet community would have been legally required, on pain of injunction or lawsuit, to block them.

Shortly before Congress indicated it would enact these bills into law, the online community raised a sharp protest that went viral and grew rapidly. Big players such as Google and Wikipedia, and millions of individuals through online petitions, argued that SOPA and PIPA would lead to Internet censorship, security gaps, and stifle the creation of new websites and services that could face legal action if accused of enabling infringement by others. Wikipedia went "dark" on January 17, 2012, to protest the bills, bringing the controversy to the attention of the mainstream press and even more members of the public. Soon after, the White House signaled it would not sign the bills unless they were significantly amended to alleviate the censorship, security, and innovation concerns expressed by the public. Congress ultimately dropped the bills from consideration.

The demise of SOPA and PIPA seems to be a watershed event in the history of copyright expansion and enforcement. New bills have been

[40] Notably, the members of the Business Software Alliance, including Microsoft, Apple, and others, did not join their usual allies in the entertainment industry to support this legislation.

introduced to alleviate online piracy, though they do not have the teeth that SOPA and PIPA had, but the point is larger than specific bills. Many members of the public have made it clear to policymakers that they believe copyright has become unbalanced in protecting ownership interests to the detriment of the public, and that they are willing to challenge, with all the technology at their disposal, new attempts to expand the reach and enforcement of copyright. How the struggle will play out at this new level will affect writers' interests in unknowable ways.